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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

I. This Court Should End The Confusion And Unsound Results Generated By The Intra-Enterprise Conspiracy Doctrine.

The "disarray" produced by the intra-enterprise conspiracy doctrine is not, as respondent would like this Court to believe, a "contriv[ance]" of petitioners. (Brief in Opposition, hereafter "Resp. Br.," 19) The characterization is taken from Professor Sullivan's *Handbook of the Law of Antitrust* (1977), which is repeatedly relied on by respondent and which flatly states that "[t]he cases, commentary and settled practices are in disarray." (*Id.* at 323)

His views are shared by the courts, other leading commentators and the *amici*. *See, e.g., Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 533 F.2d 620, 625 (9th Cir. 1977) (the doctrine has led to "an unresolved conceptual blur when applied to the variant fact situations presented by diverse

economic entities and functional structures"); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 21 (1968) (the "net result [of the doctrine] is thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts"); Amicus Brief of National Association of Manufacturers, p. 3 (the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations").[1]

Nothing supports respondent's suggestion that the more recent cases have eliminated the "conflict among the circuits." (Resp. Br. 15-19) Of the intra-enterprise decisions listed in Appendix H to the Petition, over 125 have been handed down in the last decade and no common thread is discernible. Since the Appendix was compiled, another ten cases have been reported, and the confusion continues.[2]

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[1] Contrary to respondent's claim, there is nothing "artificial" in petitioners' assertion that "[a]t least five divergent tests" have been applied by the lower courts. (*Contrast* Resp. Br. 15 *with* Pet. 10) The recent article by Handler & Smart, cited by the court of appeals and reproduced in Appendix I, makes precisely the same five-fold classification. (3 Cardozo L. Rev. 23, 38-61; App. I-24 to I-59) *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 668-76 (1982), adopting a similar classification.

[2] Four of these cases discuss the doctrine directly. *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983); *General Business Systems* v. *North American Philips Corp.*, 1982-83 Trade Cas. ¶ 65,177 (9th Cir. 1983); *Loube* v. *Chrysler Corp.*, 1982-83 Trade Cas. ¶ 65,098 (D. Md. 1982); *Damon Corp.* v. *Geheb*, 1982-83 Trade Cas. ¶ 65,117 (N.D. Ill. 1982). *See also Litton Systems, Inc.* v. *AT&T*, 1982-83 Trade Cas. ¶ 65,194 (2d Cir. 1983); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982); *D&S Redi-Mix* v. *Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 1982-83 Trade Cas. ¶ 65,202 (D.D.C. 1982); *Turner* v. *Johnson & Johnson*, 549

(footnote continued on next page)

Especially notable is the recent opinion by a different panel of the Seventh Circuit in *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983). Not only does the panel (in an opinion by Judge Posner) make no mention of the *Copperweld* case, but it appears to resuscitate the "holding out as competitors" test:

> "[T]he complaint does not allege that the affiliates, despite being owned in common, hold themselves out as competitors, as is probably required for a conspiracy among affiliated companies to be a per se violation of the antitrust laws." (*Id.* at p. 71,463; citing *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975))

Judge Posner's reliance on the "holding out as competitors" test dramatizes not only the conflict among, and even within, the circuits but also the practical importance of the standard applied. It is undisputed that Copperweld and Regal never were or held themselves out as competitors. (Pet. 3)

Judge Posner's decision is also significant for its citation to *Citizens & Southern* as the authority for the "holding out as competitors" test. This sharply conflicts with respondent's claim that the case endorses the "rule" that liability should be imposed on affiliated companies where their activities "restrict the trade of third parties." (Resp. Br. 13) In point of fact, no such "rule" can be found in *Citizens & Southern* or any of this Court's other intra-enterprise conspiracy cases. Instead, the "rule" derives from the attempt in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* to reconcile this Court's early decisions in *Yellow Cab, Kiefer-Stewart* and *Timken*. Although some Committee members suggested such a distinction between parent-subsidiary activities directed at "the trade of strangers" and

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(footnote continued from preceding page)

F. Supp. 807 (D. Mass. 1982); *Levicoff* v. *General Motors Corp.*, 551 F. Supp. 98 (W.D. Pa. 1982).

those of an "internal" nature, the only *consensus* the Committee was able to achieve was that:

> "It is obviously unrealistic to expect or to command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart,* or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it. While the decision on illegality in both cases can be otherwise justified, we believe the remedy provided in the *Timken* case, requiring competition among companies now fully controlled by American Timken, sacrifices substance to form." (*Report* at 36)

Respondent's "rule" was likewise not accepted below. The district court's jury instructions—which were expressly adopted by the Seventh Circuit (691 F.2d at 318-19, 331-32; A-13, 40-41)—made no mention of "restraint on third parties" as a factor to be considered in deciding the capacity to conspire issue. To the extent the standard has been applied in some cases, it has been criticized as "unworkable and unreal" in others. *See Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 n.20 (8th Cir. 1981). As Handler & Smart explain:

> "The fundamental problem with the standard is that the majority of intracorporate agreements are likely to have some effect on third parties. For example, a parent's decision that its subsidiary should lower its prices to increase volume may well take business away from competitors who could claim that the pricing decision was aimed at outsiders and adversely affected them. A decision by a manufacturer that its subsidiary should cut distribution costs by withdrawing from a certain geographic area or refusing to sell to certain customers will obviously have an adverse effect on the subsidiaries' customers." (3 Cardozo L. Rev. at 50-51; App. I-43; footnote omitted)

The confusion over the proper standard is further brought home by respondent's claim that the Department of Justice

has adopted an "effect on third parties" test in its enforcement activities. (Resp. Br. 13-14) By contrast, the Seventh Circuit observed that "government enforcement agencies do not use the doctrine." (691 F.2d at 317; A-9) As Handler & Smart say: "[T]he Justice Department has eschewed the doctrine in the main, as has the FTC after some flirtation with it in the early 1950's." (3 Cardozo L. Rev. at 66; App. I-66-67; footnotes omitted) This is confirmed by the numerous Justice Department consent decrees exempting activities involving a corporation and its subsidiaries from their application, even though "restrictions on third parties" may be involved. *E.g.*, *United States* v. *Beech Aircraft Corp.*, 1965 Trade Cas. ¶ 71,570 (D. Kan.) ("disciplinary action" against third-party distributors); *United States* v. *Studebaker Corp.*, 1965 Trade Cas. ¶ 71,410 (D. Neb.) (restricting independent dealer territories); *United States* v. *Greater New York Roll Bakers Ass'n*, 1964 Trade Cas. ¶ 71,265 (S.D.N.Y.) (eliminating competing producers).

To remove the uncertainty respondent has raised regarding the position of the United States, petitioners are filing with this Reply a motion that this Court solicit the views of the United States both on its own enforcement policy and on the general question of the proper scope of the intra-enterprise conspiracy doctrine. This Court has frequently invited the United States to submit *amicus curiae* briefs on antitrust questions with broad significance. *E.g.*, *AT&T* v. *Phonetele, Inc.*, 51 U.S.L.W. 3253 (October 4, 1982); *Weit* v. *Continental Illinois National Bank*, 454 U.S. 810 (1981).

Clarification of these points is, as the present *amici* briefs demonstrate, of vital importance to the efficient planning of corporate enterprise. The Chamber of Commerce of the United States emphasizes that the existing "confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability." (p. 2) The American Iron and Steel

Institute's brief likewise underscores that the issue is "no mere academic problem" (p. 2), and urges that:

> "The rule suggested by petitioners offers this Court an opportunity to reconcile the broad statements of *Yellow Cab* with the central perception of *Sunkist* that 'grave legal consequences [should not be imposed] upon organizational distinctions that are of *de minimis* meaning and effect. . . .' 370 U.S. at 29. An approach based upon ownership and legal control would bring about greater predictability and eliminate a situation in which antitrust liability can rest on the formality of whether a company chooses to operate through separately incorporated subsidiaries or through divisions." (p. 9)

Respondent's assertion (Resp. Br. 19-22) that this Court lacks the power to adopt the rule proposed by petitioners, and that the issue must be left to Congress, is meritless. Not surprisingly, respondent cites no authority for its unprecedented claim. Rather, the cases and commentators have consistently concluded that, having fashioned the initial outlines of the doctrine, this Court is free to redefine its contours. (*See, e.g.*, Handler & Smart, *supra*, 3 Cardozo L. Rev. at 26; App. I-5-6) Indeed, if limitations on the doctrine were really "an impermissible, judicially created exemption" from the Sherman Act (*id.* at 8), this Court's decisions in *Sunkist Growers* and *Citizens & Southern* would have been impossible.

II. This Court Should Confirm That Market Share And Structure Evidence Is Crucial In Rule Of Reason Cases.

There are equally compelling reasons for this Court to insist that market share and structure evidence must be examined in a rule of reason case in order to determine whether defendants possessed sufficient market power to have the adverse effect on competition required to bring the Sherman Act into play. This is not an issue of the sufficiency of the evidence, as respondent urges (Resp. Br. 8), but of the

proper market factors to be weighed by the jury and the reviewing court in assessing competitive impact. The refusal by the courts below even to consider the crucial evidence that the relevant market here was at all times competitively structured impermissibly transformed a routine tort action into a violation of the federal antitrust laws.[3]

It is axiomatic under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that the antitrust laws only provide "protection of *competition*, not *competitors*." (*Id.* at 488; emphasis in original) Decisions from other circuits make clear that in assessing whether an adverse effect on *competition* has occurred—which is the vital factor separating Sherman Act remedies from those under state tort and unfair competition laws—it is imperative to consider "the defendant's market share before and after the unfair conduct, the number and relative size of firms in the market, the conditions of entry, the potential competition from firms outside the market, and whether a trend toward concentration exists." *Northwest Power Products, Inc.* v. *Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The reason for examining such structural evidence rests on the elementary economic principle that, where the market as a whole is competitive, "the elimination of a single competitor, standing alone, does not prove anticompetitive effect." *Kaplan* v. *Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

The need to take account of these legal and economic principles was critical here. The only economist to appear at the liability trial stated that, because the market was already competitive, respondent's temporary exclusion could not have had any effect on price or supply. (Brozen Tr. 5450-52; 5462-65) Faced with this evidence, the trial court plainly

[3] Because the sufficiency of the evidence is not at issue, we do not pause to correct respondent's factual misstatements. Suffice it to observe that respondent never cites to the factual summary by the court of appeals, only to its own selective quotations from a contested record.

erred in failing to instruct on the important role of market share and market structure proof.[4]

The Seventh Circuit was equally in error in *assuming*, without a critical review of the structural evidence, that the exclusion of respondent as a potential competitor led to a diminution of competition. (Pet. 23) Its approach ignored the clear statements of this Court that foreclosure of a new entrant is unlikely to have an adverse impact on competition where the market is not highly concentrated. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 603 (1974). Though applying Section 7 of the Clayton Act, the *Marine Bancorporation* analysis is equally applicable here, since the statute's incipiency standard requires even *less* of a showing of market impact than Section 1. (*Compare* Resp. Br. 27)

Conclusion

A writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals for the Seventh Circuit.

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[4] Respondent's argument (Resp. Br. 26 n.25) that the jury was not "precluded" from considering such evidence is specious; it was incumbent on the trial court to charge the jury to consider it.